No. 06-

In the Supreme Court of the United States

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*

v.

ALEXANDRE MIRZAYANCE, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

Section 2254(d)(1) of Title 28 of the United States Code provides in part that federal habeas corpus relief "shall not be granted" on a claim "adjudicated on the merits" in state court unless the adjudication resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court." In this case, following an evidentiary hearing in which the district court resolved all factual disputes against the state prisoner, the Ninth Circuit Court of Appeals granted habeas relief without analyzing the state court adjudication under § 2254(d)(1), and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. The questions presented are:

1. May a federal habeas corpus court grant relief by reviewing a state prisoner's claim de novo on the basis of a federal evidentiary hearing record, without considering whether the state court's adjudication of the claim had been reasonable?

2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were "clearly erroneous?"

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PETITION FOR WRIT OF CERTIORARI

Michael A. Knowles, Warden, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinions of the federal court of appeals and the district court are unpublished. The opinion of the California Court of Appeal, and the California Supreme Court's summary denial of habeas corpus relief, are unpublished. Each is reproduced in the Appendix to this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

JURISDICTION

The opinion of the court of appeals was filed on April 10, 2006. The court of appeals' denial of the Warden's petition for rehearing and suggestion for rehearing en banc was filed on June 7, 2006. Pet. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. *The Crime*

Respondent Mirzayance fatally stabbed and shot his nineteen-year-old cousin, Melanie Ookhtens, in her family's home. Immediately after the homicide, Mirzayance gathered the knife and the spent shell casings, showered, disposed of his bloody clothes, and left a false alibi message on Ookhtens's answering machine. Hours later, at the urging of a friend, Mirzayance turned himself in to police. He explained that he killed Ookhtens because she had "pissed him off" and because he had smoked marijuana. However, a urine sample taken from Mirzayance four hours after the murder tested negative for marijuana.

2. *State Court Proceedings*

Mirzayance was charged with first-degree murder. He entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, such pleas result in a bifurcated trial. In the first phase, the jury renders a verdict solely on the question of guilt. If the jury finds the defendant guilty, a second phase occurs in which the jury determines whether the defendant has proven, by a preponderance of the evidence, that he was not sane at the time of the offense. Cal. Pen. Code §

1026.

Mirzayance's trial counsel, Donald Wager, sought to obtain a guilt-phase verdict of only second-degree murder—a level of culpability that he conceded to the jury—and thereafter to secure an NGI verdict. The jury, however, returned a verdict of first-degree murder. After conferring with his co-counsel, Wager advised Mirzayance to withdraw the NGI plea. Mirzayance did so and was sentenced to prison for a statutorily-mandated term of twenty-nine years to life.

In state habeas corpus proceedings, Mirzayance claimed that Wager had rendered ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984), for advising him to withdraw the NGI plea. The California Court of Appeal and the California Supreme Court summarily denied Mirzayance's ineffective-assistance claim without explanation. Pet. App. F & H.

3. *Federal Habeas Corpus Proceedings*

a. Mirzayance raised the same ineffective-counsel claim in a federal habeas petition. The district court denied relief, concluding that the state-court decisions were "neither contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d)." As the district court explained:

> Given that the jury rejected Dr. Satz's [guilt-phase expert opinion] that [Mirzayance's] mental impairments deprived him of the ability to perform the more demanding tasks of deliberating and planning a murder, defense counsel reasonably predicted that this same jury would find plaintiff fully capable of discerning right from wrong and would, therefore, reject the proffered insanity defense. Defense counsel, who knew what he had to present during the insanity defense portion of the trial, made an informed decision that he did not have sufficient evidence to cause this jury to change its mind. Having concluded that there was no chance of success on the insanity defense, counsel advised his client to waive the defense and accept the sentence of the court.
>
> * * *
>
> Accordingly, on this record, counsel's strategic

> decision to recommend the withdrawal of the insanity defense, made after consultation with [Mirzayance], was not an unreasonable one, and does not constitute ineffective assistance of counsel.

Pet. App. at 114-18.

b. Mirzayance appealed. Noting that "[t]he record presents conflicting reasons for the abandonment of the insanity defense," the United States Court of Appeals for the Ninth Circuit remanded the case to the district court "with instructions to conduct an evidentiary hearing on whether counsel was deficient for recommending and concurring in the withdrawal of the insanity defense [*Strickland* prong one], and if so, whether this ineffectiveness prejudiced Mirzayance [*Strickland* prong two]." Pet. App. 74, 82.

c. Following a four-day evidentiary hearing, the district court resolved all factual disputes against Mirzayance. The district court found that the jury's conclusion that the murder was "willful, premeditated, and deliberate" meant the defense's strategy—to obtain a conviction of only second-degree murder—had failed. The court also found that, although Wager had planned to proceed with a sanity phase anyway, he believed that "[a]ny remaining chance of securing an NGI verdict . . . now depended (in his view) on presenting some 'emotional impact' testimony *by Petitioner's parents*, which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." Pet. App. 17, 25. But the court determined that just before the sanity phase was to begin, Mirzayance's parents—to Wager's surprise—made it clear that they would not testify and that their attorney suggested to Wager that he proceed without them. The district court further found that, although Wager was angry, he concluded that the parents' refusal to testify was a "done deal," and "one that any beseeching on his part could not undo." Pet. App. 43-47.

Wager then consulted with his co-counsel, who concurred that they should withdraw the NGI plea. Pet. App. 42-43. The district court found that Wager "carefully weighed his options before making his decision final," that he had "made a rational choice to forgo the insanity defense," and that his decision was

"carefully considered," "not rashly made," and "appeared to be reasonable to him and his co-counsel, in light of the guilt phase verdicts and the parents' statements to him on the way to court that morning." Pet. App. 40-43.

Crediting counsel's decision as competent, the district court opined that, under the deferential standard of review required by 28 U.S.C. § 2254(d) as amended in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the state courts' rejection of the claim did not result from an unreasonable application of *Strickland.* The court also stated that its opinion would be the same even under de novo review of the record as expanded in federal court. Pet. App. 65-66.

Despite its factual and legal conclusions, however, the district court ultimately granted the writ because, in its view, the Ninth Circuit's remand order had amounted to a "mandate" that "destined [Mirzayance] to relief." The court noted that the remand order had contained a parenthetical citation to the pre-AEDPA case of *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987), an ineffective-counsel case in which the Fifth Circuit had observed that it could see "no advantage" in a trial counsel's decision to bypass an insanity defense. Pet. App. 65-66. The district court inferred from the Ninth Circuit's citation that the "'nothing to lose' rule pronounced in *Profitt*" was the "law of the case." Thus, the district court explained, the function of the evidentiary hearing was simply to determine, de novo, "whether, in fact, Petitioner had nothing to lose." Because defense counsel Wager had acknowledged there was nothing that Mirzayance "*gained* by waiving the NGI trial," the district court said it was "bound" to find that counsel had "nothing to lose," and that his performance was therefore necessarily deficient under *Proffitt*. Pet. App. 66-68 (italics added). The district court did not assess whether Wager's "deficient" performance had been prejudicial under *Strickland*. Instead, it concluded that the Ninth Circuit, per the remand order, had already decided that Wager's remaining NGI defense was "viable and strong" and that there was a reasonable probability Mirzayance "would have obtained a better trial outcome had that defense been presented." Given the perceived mandate, the district court "reluctantly" granted relief. Pet. App. 11-13,

67-68.

d. The Warden appealed and argued, inter alia, that the state-court decision was reasonable and thus conclusive under 28 U.S.C. § 2254(d)(1). The Ninth Circuit affirmed. In an unpublished 2-to-1 opinion, the panel first explained that the district court had erred in inferring any mandate for relief from the remand order. The majority, however, did not implement the ruling denying relief that the district court stated it would have issued absent the perceived mandate. Nor did it analyze whether the state courts' adjudication of the claim had been contrary to or an objectively unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). Rather, the majority affirmed the granting of the writ, "albeit on different grounds."

The panel majority replaced the district court's "key" factual findings with its own opposite findings. The panel majority found (1) that Wager had acted "rashly," and (2) that the parents had not refused to testify. Pet. App. 5. The majority then concluded that "'reasonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." Pet. App. 6 (quoting *Strickland*, 466 U.S. at 687). The majority further concluded that, if Wager had proceeded with a sanity phase, "there is a reasonable probability—one 'sufficient to undermine the confidence in the outcome'—that the jury would have found Mirzayance insane." *Id.*

The dissent contended that the majority should have deferred to the district court's well-founded "explicit factual findings," and that the majority's opinion "suggests that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This is not the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987)." Pet. App. 8-10.

The Warden filed a petition for rehearing and suggestion for rehearing en banc, arguing that the panel majority failed to analyze the state court's ruling under 28 U.S.C. § 2254(d)(1)

and wrongly substituted its own factual findings for those of the district court. The court of appeals declined to rehear the case en banc. Pet. App. 1.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT AGAIN IMPROPERLY IGNORED § 2254(D)(1) AND ALSO IGNORED WELL-ESTABLISHED PRINCIPLES LIMITING ITS REVIEW OF DISTRICT COURT FACT FINDINGS

1. Certiorari should be granted, first, because this case presents a recurring issue of fundamental legal significance that strikes at the very balance of state-federal power set by Congress in AEDPA. Here, Mirzayance raised his federal ineffective-assistance claim in habeas corpus petitions in the California Court of Appeal and California Supreme Court. The state courts' summary dismissals of the claim signaled, under well-established California practice, that the state courts had assumed Mirzayance's factual allegations to be true but nevertheless rejected his constitutional claim on its merits. In granting federal relief, however, the Ninth Circuit ignored—as it has done in past cases—the 28 U.S.C. § 2254(d)(1) inquiry into whether the state-courts' adjudication of the habeas corpus petitioner's claim was in any event reasonable and therefore conclusive. As this Court has stressed repeatedly in a string of reversals of Ninth Circuit decisions out of California, AEDPA mandates that federal habeas corpus relief is unavailable unless and until a federal court determines that the state court's adjudication of the prisoner's claim fails deferential review under § 2254(d)(1). *E.g.*, *Early* v. *Packer*, 537 U.S. 3, 11 (2002) (*per curiam*); *Woodford* v. *Visciotti*, 537 U.S. 19, 26-37 (2002) (*per curiam*); see, *e.g.*, *Rice* v. *Collins*, 126 S. Ct. 969, 971-76 (2006); *Brown* v. *Payton*, 544 U.S. 133, 140-46 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652, 664-66 (2004); *Middleton* v. *McNeil*, 541 U.S. 433, 436 (2004); *Yarborough* v. *Gentry*, 540 U.S. 1, 5 (2003) (*per curiam*); *Lockyer* v. *Andrade*, 538 U.S. 63, 75-76 (2003).

A federal habeas court's refusal to accord deference has special legal significance in ineffective-counsel cases, such as

this one, where a "doubly deferential" standard of review is required under AEDPA. *Yarborough*, 540 U.S. at 4. As this Court has most recently explained to the Ninth Circuit, "[a] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice*, 126 S. Ct. at 971. Here, it was the Ninth Circuit's error in this regard that determined the outcome of the case. Under proper deferential review, the state courts' rejection of Mirzayance's *Strickland* claim passed muster under § 2254(d)(1). For, under the circumstances and as explained below, it is reasonable to conclude that trial counsel's performance was competent under prevailing professional norms, and it is reasonable to conclude that Mirzayance's NGI defense would not have succeeded.

2. Certiorari should also be granted because the Ninth Circuit opinion directly conflicts with fundamental principles of appellate review as set forth by the Federal Rules of Civil Procedure and by this Court. The Ninth Circuit disregarded the district court's key factual findings and credibility determinations, which were fatal to Mirzayance's claim, and proceeded to grant habeas relief based on its own, opposite factual findings. The panel majority, however, never intimated that the district court's findings were not plausible or were "clearly erroneous." See Fed. R. Civ. Pro. 52(a); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-74 (1985). Federal appellate courts may not ignore the settled standard of factual review in order to set aside a state court judgment.

A. The Ninth Circuit Improperly Ignored the Threshold and Dispositive 28 U.S.C. § 2254(d)(1) Question

In this case, the state courts adjudicated and rejected Mirzayance's federal constitutional claim on the merits. But rather than reviewing that adjudication under the deferential standards of 28 U.S.C. § 2254(d), the Ninth Circuit erroneously granted relief based on its own de novo review of the federal evidentiary hearing record. As it has been constrained to do on many similar occasions in the past, this Court should step in and rectify the Ninth Circuit's fundamental error.

1. In California, a petitioner seeking habeas corpus relief must make specific factual allegations that state a claim upon which relief can be granted. *In re Swain*, 209 P.2d 793, 796 (Cal. 1949); see *In re Robbins*, 959 P.2d 311, 341 n.1 (Cal. 1998) (Mosk, J., conc.). The state court reviews the factual allegations and, if a prima facie claim has been made, an order to show cause is issued. *In re Sassounian*, 887 P.2d 527, 534 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 390-93 (Cal. 1994).

Here, the California Court of Appeal and the California Supreme Court summarily resolved Mirzayance's ineffective-assistance claim on the merits, but without a statement of reasons. Pet. App. F & H. As the California Supreme Court has repeatedly explained, a summary rejection of a habeas corpus claim without a statement of reasons is based on the assumption that the facts alleged in support of the claim are true but nevertheless do not make out a prima facie case of a valid constitutional claim. *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993); *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979).

The California Supreme Court's decision rejecting Mirzayance's claim, therefore, was an adjudication on the merits. The Ninth Circuit has recognized that this is California's procedure. See *Griffey* v. *Lindsey*, 345 F.3d 1058, 1066, *vacated as moot* 349 F.3d 1157 (9th Cir. 2003); *Visciotti* v. *Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), *rev'd on other grounds*, 537 U.S. 19 (2002); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc), *cert. denied*, 420 U.S. 973 (1975) (holding that a California Supreme Court's "postcard denial without opinion is . . . a decision on the merits of the petition"); *accord Bennett* v. *Mueller*, 364 F. Supp. 2d 1160, 1173 (C.D. Cal. 2005).

2. Federal habeas corpus relief therefore is precluded in this case unless the state courts' ruling—that Mirzayance's claim was meritless even if his factual allegations were assumed to be true—was "contrary to" this Court's precedents, or an objectively "unreasonable application" of them, under § 2254(d). The district court twice showed this § 2254 deference, correctly explaining in two decisions that

Mirzayance's claim failed as a matter of law under AEDPA.[1/] Pet. App. 65-66, 114-18. But the Ninth Circuit, without analyzing the state courts' adjudication pursuant to § 2254(d)(1), granted relief by reviewing Mirzayance's claim de novo on the basis of a federal evidentiary hearing record alone. The Ninth Circuit mentioned the AEDPA standard at the outset of its opinion but never referred to it again. The panel majority opinion is devoid of any discussion of the state courts' adjudications in light of AEDPA; and, certainly, it never asserts how the state courts' denial of relief was objectively unreasonable. Thus, as in *Rice* v. *Collins*, "[t]hough it recited the proper standard of review," the Ninth Circuit improperly ignored that standard, and then substituted its evaluation of the federal evidentiary hearing record for the state court's evaluation of the state court's record. *Rice*, 126 S. Ct. at 973.

By ignoring the threshold § 2254(d)(1) inquiry, the Ninth Circuit again misapplied "settled rules that limit its role and authority" in AEDPA cases. *Id.* By making no statement of a § 2254(d) conclusion, and no effort to explain how the state court adjudication was objectively unreasonable, the Ninth Circuit afforded even less deference than that found to be insufficient in *Woodford* v. *Visciotti*, in which the Ninth Circuit at least undertook a § 2254(d) analysis. 537 U.S. at 22-27.

This Court explained to the Ninth Circuit in *Woodford* precisely what the panel majority ignored here: that "[t]he federal habeas scheme leaves primary responsibility with the state courts for these [ineffective-assistance claim] judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Id.* at 27. Whether a federal court would reach the same conclusion as the California Supreme Court is beside the point; the controlling question is whether the state court's contrary assessment was objectively unreasonable. *Id.* Thus, federal

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1. The district court, however, "reluctantly" granted relief because of a mistaken belief that the Ninth Circuit's remand order was a "mandate" that "destined [Mirzayance] to relief," and gave it "no alternative other than to grant the Petition." Pet. App. 11-13, 65-68.

habeas corpus relief is unavailable unless and until it is first determined that the state court's summary resolution fails deferential § 2254(d)(1) scrutiny.

3. In this case, application of AEDPA's deference standard would have led to the inescapable conclusion that the state courts' adjudications were conclusive because they were not "contrary to" or "unreasonable applications" of "clearly established Federal law as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Under *Strickland*, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must show both that, considering all the circumstances, his counsel's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687. These principles, as set forth in *Strickland*, are "clearly established Federal law" under AEDPA. *Bell* v. *Cone*, 535 U.S. 685, 694 (2002).

a. On the "performance" prong of the ineffective-counsel test, however, the Ninth Circuit failed to accord counsel's tactical decision the requisite "double deference" under AEDPA and *Strickland*. *Yarborough* v. *Gentry*, 540 U.S. at 4. It did the opposite. As the dissenting opinion recognized, Pet. App. 9-10, the panel majority applied a completely different standard—one inquiring whether counsel had "nothing to lose"—in place of the "clearly established" *Strickland* standard. The panel majority held that Wager's decision to forgo a possible NGI verdict was deficient because it secured "only the loss of this sole potential advantage," and that "no actual tactical advantage was to be gained by counsel's advice." Thus, the panel majority concluded, "[r]easonably effective assistance" would mean putting on "the only defense available." Pet. App. 6.

A state-court adjudication of an ineffective-counsel claim may not be deemed "contrary to" *Strickland*, or an "unreasonable application" of it, for declining to adopt and apply the Ninth Circuit's novel "nothing to lose" rule. This Court has never announced such a rule itself. On the contrary, it has explained that attorneys are *not* obligated to advance all nonfrivolous claims, motions, defenses, arguments, et cetera, that might theoretically succeed and thus benefit their clients.

See *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983) (appellate counsel has no constitutional duty to raise every nonfrivolous issue requested by a defendant); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985); see also *Evans* v. *Meyer*, 742 F.2d 371, 374 (7th Cir. 1973) (lawyer need not advise client of "every defense or argument or tactic that while theoretically possible is hopeless as a practical matter"). As this Court has explained, even when there *is* a bona fide defense, "counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." *United States* v. *Cronic*, 466 U.S. 648, 656, n.19 (1984). Far from being "clearly established Federal law," a "nothing to lose" standard is unworkable under *Strickland*: it imposes an impermissible per se rule that, whenever a lawyer has multiple expert opinions finding insanity, he must *always* go forward with an insanity phase, regardless of his professional judgment as to its appropriateness or likelihood of success.

Because the Ninth Circuit's test for ineffective assistance was not "clearly established Federal law as determined by the Supreme Court" "at the time the state court render[ed] its decision" (*Andrade*, 538 U.S. at 71), application of § 2254(d)(1) precludes habeas relief on the ground that Wager should have advanced an NGI defense because it was the only defense available.

b. In any event, the state courts' rejection of Mirzayance's claim precluded federal habeas corpus relief under § 2254(d)(1) because the record before the state courts reasonably supports the conclusion that counsel's challenged decision was not "prejudicial" under the second prong of the *Strickland* standard. Mirzayance presented most, if not all, of his material factual allegations to both the California Court of Appeal and the California Supreme Court. Indeed, the direct testimony of the key witnesses at the federal evidentiary hearing consisted of the same declarations filed in state courts. As noted above, the California Supreme Court assumed those factual allegations were true, but concluded that Mirzayance's constitutional claim still failed as a matter of law. The state courts did not unreasonably apply *Strickland* in rejecting Mirzayance's claim for lack of prejudice.

Strickland places the burden on the petitioner to establish a "reasonable probability" of prejudice. *Strickland*, 466 U.S. at 694. In the context of Mirzayance's challenge to the withdrawal of an NGI plea, that appears to mean demonstrating a reasonable probability that the jury otherwise would have found him not guilty by reason of insanity. See, *e.g.*, *United States* v. *Cox*, 826 F.2d 1518, 1525-26 (6th Cir. 1987); *Profitt*, 831 F.2d at 1250-51; *Weekley* v. *Jones*, 76 F.3d 1459, 1462 (8th Cir. 1996); *Weeks* v. *Jones*, 26 F.3d 1030, 1038 (11th Cir. 1994).

To prevail on an insanity claim under California law, the defendant must prove by a preponderance of the evidence that he was legally insane, meaning that—regardless of whether he suffered from a mental disease or disability—he either could not appreciate the nature and quality of his actions at the time he committed the crime or could not appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *People* v. *Skinner*, 704 P.2d 752, 763-65 (Cal. 1985). Here, only the latter question was at issue, for no one has opined that Mirzayance failed to appreciate the nature and quality of his actions.

Even if it were assumed that Mirzayance's parents and experts would have testified as alleged in his state habeas petitions, it would not be "objectively unreasonable" under *Strickland* to conclude that Mirzayance had not established a "reasonable probability" that the jury would have found he could not appreciate the wrongfulness of his actions. The same jury had already concluded that he deliberated and premeditated Ookhtens's murder, despite extensive mental-health testimony by Dr. Satz as to Mirzayance's mental condition. As properly instructed, the jury thus determined that he killed after careful thought and weighing considerations for and against doing so. See CALJIC No. 8.20.

Although Mirzayance's experts were prepared to opine that he did not know killing Ookhtens was wrong because he was acting on the paranoid delusion that he needed to defend himself, their testimony met a serious obstacle in the form of the jury's own determination that Mirzayance was guilty of premeditated and deliberate murder. Moreover, such expert

opinions could not be reasonably reconciled with the facts of the crime. Mirzayance's pre- and post-murder actions were obviously goal-oriented, rather than irrational, and clearly showed he knew the murder was wrong. Those actions included: waiting until he was alone with Ookhtens in the house before he closed the curtains and commenced his attack; collecting the knife and spent shell casings immediately after the murder; showering, disposing of his bloody clothes in a trash can, and concocting a false alibi on a telephone answering machine. Accordingly, even if Wager's decision to forgo an affirmative NGI defense amounted to deficient performance, the state courts were not wrong—let alone "objectively unreasonable"—in rejecting Mirzayance's *Strickland* claim.

B. The Ninth Circuit Improperly Substituted Its Own Factual Findings for Those of the District Court

Certiorari also should be granted to correct the Ninth Circuit's departure from the rules governing appellate review of district-court factfinding. As the dissent correctly stated in the panel's divided opinion, "the district court found that the trial counsel had made a rational, carefully considered, and informed decision to forgo the insanity defense." Pet. App. 8-9. The district court also found that the parents' actions amounted to "an express refusal to testify." *Id.* at 9.

But, without even discussing whether the district court's findings were clearly erroneous, the panel majority concluded: "We disagree that counsel's decision was carefully weighed and not made rashly." Pet. App. 5. And, as for the parents' refusal to testify, the majority inexplicably stated that "the district court's finding that the parents *did not refuse*, but merely expressed reluctance to testify is correct." *Id.* (italics added). By making its own factual findings, and then granting habeas relief because of those findings, the Ninth Circuit failed to heed both AEDPA and established principles of appellate review as set forth by the Federal Rules of Civil procedure and by this Court.

A federal appellate court must assess a district court's factual findings under the "clearly erroneous" standard of review. Fed. R. Civ. Pro. 52(a); *Anderson*, 470 U.S. at 573. As long as the

trier of fact's account of the evidence "is *plausible* in light of the record viewed in its entirety," a circuit court of appeals may not reverse it "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74 (italics added). Moreover, "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

Here, the district court's factual findings, which clearly support the correctness and the reasonableness of the state-court decision, are well-supported by the record, and the panel majority did not suggest otherwise. Indeed, in support of its conclusion that counsel's decision was rational, carefully considered, informed, and not rashly made, the district court explained: (1) that Wager had hired multiple mental health experts to testify at the sanity phase that Mirzayance had committed the killing without premeditation or deliberation; (2) that Wager had recognized his expert testimony had "significant weaknesses," and he "convincingly detailed ways in which [the experts] could have been impeached[] for overlooking or minimizing facts which showcased [Mirzayance's] clearly goal-directed behavior"; (3) that the experts were subject to other impeachment, including evidence that one of the experts had altered his notes in a highly-publicized criminal case; (4) that Wager's strategy at the sanity phase had been to appeal to the jurors' emotions, which required "the heartfelt participation of [Mirzayance's] parents as witnesses"; (5) that Mirzayance's parents refused to testify, which made Wager's sanity-phase strategy "impossible to attempt"; and (6) that, prior to making his recommendation, Wager conferred with his "experienced co-counsel, Lawrence Boyle," who concurred in Wager's proposal. Pet. App. 42-43.

As for the district court's second "key" finding—that the parents refused to testify—the district court dedicated an entire section of evidentiary analysis to the issue. Over the course of five pages, the district court detailed the extensive live testimony and record evidence upon which the court made its credibility determinations. Pet. App. 43-47.

Thus, it was improper for the panel majority to set aside the

district court's factual findings and to conclude instead that Wager's decision was "made rashly" and was not carefully weighed. It was equally improper for the panel majority to disregard the finding that the parents conduct amounted to a "an express refusal to testify" and to instead opine that Wager "did not know with any certainty that Mirzayance's parents would not testify . . . ." In making its own contrary findings, the Ninth Circuit ignored the settled rule that "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Anderson*, 470 U.S. at 573-74; *Zenith*, 395 U.S. at 123.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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